

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CARROL ED SANDERS

PLAINTIFF

vs.

Civil Action No. 1:95cv237-D-D

JOHNNY NUNLEY, LARRY WILSON,
BENNY PARRISH, STEVE GRISHAM,
DEBORAH GRISHAM and WESTERN
SURETY COMPANY

DEFENDANTS

MEMORANDUM OPINION

This action arises from the plaintiff's allegations of wrongdoing and misconduct on the part of Tishomingo County law enforcement officials. By order dated April 18, 1996, this court denied the motion of the defendants Tishomingo County and Benny Parish to dismiss this §1983 action in part upon the ground that the plaintiff's federal law claims are constrained by the Mississippi statute of limitations which governs various intentional torts, Miss. Code Ann. § 15-1-35. Sanders v. Nunley, et al., Civil Action No. 1:95cv237-D-D (N.D. Miss. Apr. 18, 1996) (Order Denying Defendants' Motions to Dismiss). The defendant Western Surety Company has now moved this court to dismiss it as a party to this action, and relies upon a virtually identical argument.

I. Statute of limitations

A. As against the plaintiff's federal law claims

Because Congress has not provided a statute of limitations

for civil rights actions brought under § 1983, federal courts adopt the forum state's general personal injury limitations period. The general limitations period is employed instead of a particular limitations period for enumerated intentional torts. Owens v. Okure, 488 U.S. 235, 249-50, 109 S.Ct. 573, 581-82, 102 L.Ed.2d 594 (1989); Flores v. Cameron County, 92 F.3d 258, 271 (5th Cir. 1996); Piotrowski v. City of Houston, 51 F.3d 512, 514 n. 5 (5th Cir.1995). This court has consistently applied Owens to prevent the application of Miss. Code Ann. § 15-1-35 to claims arising under § 1983, *regardless of whether those federal law claims are analogous to state law intentional torts.*¹ See, e.g., Smith v. Luther, Civil Action No. 4:96cv69-D-B (N.D. Miss. Aug. 14, 1996) (Davidson, J.) (Memorandum Opinion and Order Denying Motion to Dismiss); Lightfoot v. Lowndes Co., Civil Action No. 1:94cv330-D-D (N.D. Miss. Jun 11, 1996) (Davidson, J.) (Memorandum Opinion and Order Denying Motion to Dismiss). Our sister court in the Southern District of Mississippi does so as well. See, e.g., Gates v. Walker, 865 F.Supp. 1222, 1229 (S.D. Miss. 1994); Flowers v. Dickens, 741 F.Supp. 112, 113 (S.D. Miss. 1990). Fifth Circuit decisions are no different. See, e.g., Gartrell v. Taylor, 981 F.2d 254, 256 (5th Cir. 1993); Jackson v. Johnson, 950 F.2d 263, 265 (5th Cir. 1992); James v. Sadler,

¹ Indeed, Owens itself involved the proposed application of an intentional tort statute of limitations. Owens, 102 L.Ed2d at 598; 488 U.S. at 237.

909 F.2d 834, 836 (5th Cir. 1990). In light of the wealth of recent caselaw on the issue stating that the general three-year limitations period is to apply, this court is not convinced by Western Surety's arguments to rule otherwise in this case.² To the extent that the plaintiff has alleged federal law civil rights claims against the defendant Western Surety Company, they are not barred by the applicable statute of limitations.³ To this extent, then, the motion of the defendant Western Surety Company shall be denied.

B. As against the plaintiff's state law claims

The plaintiff's complaint can be read broadly to assert both state and federal law claims. Under Mississippi law, the plaintiff may sue the defendant Western Surety in a contract action - directly against the bond of Sheriff Nunley for "breach of the sheriff's official duty." See, e.g., City of Mound Bayou v. Johnson, 562 So. 2d 1212, 1217 n. 3 (Miss. 1990); U.S.F.&G. v. Mississippi, 182 So. 2d 919, 923 (Miss. 1966) ("*A suit on the surety contract may be maintained although the liability on the contract grows out of a tort.*") (emphasis

² Western Surety also asserts that even if the plaintiff's claims are not barred by the applicable statute of limitations, they should be barred by the doctrine of laches. Such a claim is not properly presented to this court via a motion to dismiss, for this court cannot say that the plaintiff "can prove no set of facts which would entitle him to relief" in this case. Thomas v. Smith, 897 F.2d 154, 156 (5th Cir. 1989) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 100-02, 2 L.Ed.2d 80 (1957)); see Mahone, 836 F.2d at 926; McLean v. International Harvester, 817 F.2d 1214, 1217 n.3 (5th Cir. 1987); Jones v. United States, 729 F.2d 326, 330 (5th Cir. 1984).

³ No other defenses against the plaintiff's § 1983 claims are raised by Western Surety in its motion to dismiss. The court is curious as to the asserted basis for § 1983 liability against Western Surety, as it does not appear that Western Surety can be classified either as a "state actor" or as in conspiracy with a state actor. Nevertheless, the issue is not before the court on the present motions.

added); Alexander v. Casey, 25 So. 2d 709 (Miss. 1946) ("The suit is on the bond.") (emphasis added); Smith v. Smith, 156 Miss. 288, 125 So. 825 (1930). The question before this court is the determination of the appropriate statute of limitations on this claim.

. Miss. Code Ann. § 15-1-35

The primary contention of the defendant Western Surety is that all of the plaintiff's claims are barred by the application of Mississippi's intentional tort statute of limitations, Miss. Code Ann. § 15-1-35. As the undersigned has already determined that the plaintiff's federal law § 1983 claims are not governed by this statute, it only remains for this court to determine if any of the plaintiff's state law claims are so barred. They are not. As a contract action, the plaintiff's claim against Western Surety on the bond is constrained by the statute of limitations for general contract actions:

[I]n the absence of a statute to the contrary, the limitation within which an action must be brought on an official bond is that provided by statute for actions on written contracts.

Smith, 125 So. at 826; see also Alexander, 25 So. 2d at 709.

While the Smith and Alexander decisions are not fresh jurisprudence, the Mississippi Supreme Court has not yet impugned their worth:

Smith and Alexander also involve suits against the surety on an official bond. Each holds that the action on such a bond is in effect a suit on a contract and for that reason is

outside the one-year [intentional tort] statute of limitations. Nothing in today's case affords us an occasion to reconsider or question the limitations period affecting an action against a surety upon an official bond.

City of Mound Bayou, 562 So. 2d at 1217 n. 3. The defendant has directed this court to no statute of limitations which otherwise applies to actions upon a sheriff's bond, and therefore Mississippi's three year residual statute of limitations applies. Miss. Code Ann. § 15-1-49. The plaintiff timely filed this action within the three year period, and the defendant's motion shall be denied as to this ground.

2. Miss. Code Ann. § 15-1-33

In their rebuttal brief, the defendant Western Surety for the first time argues that if the intentional tort statute of limitations does not apply, then the one year limitations period set forth in Miss. Code Ann. § 15-1-33 does apply. Its failure to raise this matter in its initial motion alone justifies denial of the motion on this ground at this juncture, as it has failed to give the plaintiff an opportunity to respond on this matter. In any event, this argument is without merit. That statutory provision provides:

All actions and suits for any penalty or forfeiture on any penal statute, brought by any person to whom the penalty or forfeiture is given, in whole or in part, shall be commenced within one year next after the offense was committed, and not after.

Miss. Code Ann. § 15-1-33. Whether or not the plaintiff's claims against Western Surety are barred by this limitation turns upon

whether those claims arise under a "penal statute."

Western Surety directs the court to a decision of the Mississippi Supreme Court which applies a predecessor of this provision to preclude an action against a sheriff on his official bond. Bank of Hickory v. May, 119 Miss. 239, 80 So. 704 (1919). In May, the Mississippi court found that a claim arising under § 4670 of the Mississippi Code in effect at that time was properly classified as a penal action, and therefore governed by the one year limitation upon penal actions. May, 80 So. at 706. In determining whether that action was penal, the court looked to the nature of recoverable damages⁴ under § 4670:

To maintain an action under this section [§ 4670] it is unnecessary that the plaintiff or complainant should have been actually damaged one cent. It is merely necessary to show that the sheriff failed to return the execution on the return day without a good excuse.

May, 80 So. 2d at 705. As clarified by later decisions of the Mississippi Supreme Court, "[a] statute that makes a wrong-doer liable to the person wronged *for a fixed sum without reference to the damage inflicted by the commission of the wrong is penal.*" See, e.g., Southern Package Corp. v. Walton, 18 So. 2d 458, 460 (Miss. 1944); State v. Newton, 3 So. 2d 816, 818 (Miss. 1941) (emphasis added).

Section 4670 of the Mississippi Code of 1906 provided for

⁴ The May court also discussed the general nature of penal actions, but primarily bases its decision upon the nature of recovery. May, 80 So. at 705-06.

the recovery of a specified amount of damages against a sheriff for his failure to return an execution directed to him:

4670. (4118) Liability for failure to return execution -
If any sheriff, coroner, or other officer, shall fail to return any execution to him directed, on the return-day thereof, the plaintiff in execution shall be entitled to recover judgment against the sheriff, coroner, other officer and his sureties, *for the amount of execution and all costs, with lawful interest thereon until the same shall be paid .*
. .

Miss. Code Ann. § 4670 (1906) (emphasis added). The current version of that statute is little different from its ancestor:

§ 19-25-41. Liability of sheriff for failure to return execution.

If any sheriff or other officer properly authorized to act for him, shall fail to return any execution to him directed, on the return day thereof, the plaintiff in execution shall be entitled to recover judgment against the sheriff or other officer, and his sureties, *for the amount of the execution and all costs, with lawful interest thereon until the same shall be paid . . .*

Miss. Code Ann. § 19-25-41 (1972) (emphasis added).

Nevertheless, both the older and current version of the statute allow a penal recovery for a sheriff's *failure to return an execution*, and not for any other reason. In May, the plaintiff Bank of Hickory sued the sheriff of Newton County and his surety under § 4670 for the sheriff's failure to return three executions issued on behalf of the bank.

It is within this context, and within this context only, that the Mississippi Supreme Court declared in May that such an action against a sheriff's bond was restricted to a one year

limitations period as it is an action for a "penalty or forfeiture" on a penal statute.⁵ The liability of the defendant Western Surety Company is contingent upon a showing by the plaintiff that the defendant Nunley, as sheriff of Tishomingo County, committed a "breach of his official duty." Such a breach can take many forms, and may arise from the breach of a penal statute or from the breach of uncodified law. The plaintiff in this case does not allege a breach of official duty under the auspices of Miss. Code Ann. § 19-25-41 for any failure of defendant Nunley to return an execution, so the precise ruling of May does not govern in this instance.

Rather, the plaintiff's state law claim against the defendant Western Surety Company that the defendant Nunley "breached his official duty" is based upon uncodified Mississippi tort law and both Mississippi and federal constitutional law. This court does not find any Mississippi⁶ statute, much less a penal one, upon which the plaintiff's claims against Western Surety are based.⁷ Even if § 15-1-33 were construed to apply

⁵ Later actions finding actions based upon "penal statutes" and relying upon the reasoning espoused in May also limited themselves to instances where liability was fixed by statute without regard to the actual damages sustained. See, e.g., Reed v. Murphey, 168 F.2d 257 (5th Cir. 1948) (liquidated damages under F.L.S.A.); Sherill v. Stewart, 199 Miss. 216, 21 So. 2d 11, 17 (1945) (statute fixing landlord's damages at "double rent" without regard to actual damages is penal); Rogers v. Newton, 191 Miss. 611, 3 So. 2d 816 (1941) (noting liability in that case "fixed at a sum certain without reference to the damage he has sustained").

⁶ As already noted elsewhere in this opinion, any federal law claims arising under § 1983 are governed by Mississippi's general three year statute of limitations. See, supra, I(A).

⁷ The only arguable statute upon which the plaintiff's state law claims could be based is the statute requiring Mississippi sheriffs to post bond. However, Miss. Code Ann. § 15-1-33 has been specifically held not to apply to fidelity bonds. Latham v. U.S.F.&G., 267 So. 2d 895 (Miss. 1972). The sheriff's bond, authorized under Miss.

not only to penal statutes, but to penal actions generally, the May justification is lacking for a finding that the plaintiff's action in this case is penal. Should the plaintiff prevail in this case, he will not necessarily recover the full amount of the bond issued by the defendant Western Surety Company. Rather, he will be permitted to recover actual damages which he must demonstrate by a preponderance of the evidence. As the recoverable damages are not fixed nor certain should the plaintiff prevail on this claim, application of the Mississippi Supreme Court's directive in May would mandate a finding that this action is remedial in nature and not governed by the prescriptive period contained in Miss. Code Ann. § 15-1-33.

II. Conclusion

The motion of the defendant Western Surety is not well taken and it shall be denied. Any federal law claims of the plaintiff arising under § 1983 are governed by Mississippi's general three-year statute of limitations. Likewise, the plaintiff's state-law claim on the sheriff's surety bond is governed by this residual three-year limitations period. As such, the plaintiff's claims are not untimely.

A separate order in accordance with this opinion shall issue this day.

Code Ann. § 19-25-1, is a fidelity bond. Poole v. Brunt, 338 So. 2d 991, 994 (Miss. 1976).

This the _____ day of January 1997.

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

CARROL ED SANDERS

PLAINTIFF

vs.

Civil Action No. 1:95cv237-D-D

JOHNNY NUNLEY, LARRY WILSON,
BENNY PARRISH, STEVE GRISHAM,
DEBORAH GRISHAM and WESTERN
SURETY COMPANY

DEFENDANTS

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Pursuant to a memorandum opinion issued this day, it is
hereby ORDERED THAT:

1) the motion of the defendant Western Surety Company to
dismiss it from this action is hereby DENIED.

SO ORDERED, this the _____ day of January 1997.

United States District Judge